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**No. PD-0703-16**

In the Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
2/3/2017
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**No. 14-15-00371-CR**
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

**No. 673236**
In the 339th District Court
Of Harris County, Texas

———♦———

**Stephen Henry Hopper**
*Appellant*

*v.*

**The State of Texas**
*Appellee*

———♦———

# State's Reply to Appellant's Brief on the Merits Filed December 14, 2016

———♦———

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Trial Judge:

**Maria Jackson,** Presiding judge

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## Statement of the Case

The appellant was indicted for aggravated sexual assault in 1993. (CR 9). When the case came to trial in 2013, the appellant filed a motion to dismiss for lack of a speedy trial; the trial court denied that motion. (CR 100). The appellant pled guilty as part of a plea agreement. (CR 57, 58). In accord with that agreement, the trial court assessed punishment at 30 years' confinement. (CR 58). The trial court certified that, while this was a plea bargain case, matters were raised by written motion filed and ruled on before trial and the defendant had the right to appeal those matters. (CR 55). The appellant filed a timely notice of appeal. (CR 61).

On direct appeal, the Fourteenth Court of Appeals affirmed the trial court's judgment. *Hopper v. State*, 495 S.W.3d 468 (Tex. App.—Houston [14th Dist.] 2016, pet. granted). This Court granted the appellant's petition for discretionary review, as well as the State's cross-petition.

## Appellant's Ground for Review

"The court of appeals erred in finding the twenty-year post-indictment delay was not a speedy trial violation where the State intentionally declined to bring the appellant from a prison in Nebraska because, according to office policy, filing a detainer fulfilled the State's legal duty."

## Statement of Facts

The appellant raped and sodomized a masseuse at knife point in August, 1993. (CR 6-7). Three months later he was indicted. (CR 9). It seems that shortly after his offense the appellant left Texas, as he was arrested in California and extradited to Nebraska before the end of the year. (CR 29). In 1995, the appellant was tried and convicted of sexual assault in a Nebraska court and sentenced to 50 years' confinement. (CR 29).

A week after the appellant began serving his Nebraska sentence, the Harris County District Attorney's Office filed a detainer on him regarding the 1993 indictment. (CR 30; State's Ex. 1). The appellant signed the detainer a couple of weeks later on May 5, 1995,

acknowledging he had been advised of the pending indictment and of his right to request a trial. (State's Ex. 1).

The appellant did not request a trial, and there is nothing in the record indicating any action on this case for the next eighteen years. In late 2012, the Harris County District Attorney's Office began researching this case. (CR 30). After concluding that the complaining witness was still alive and willing to testify, on September 4, 2013 the State sent paperwork to the appellant again asking if he wanted to have a trial on this pending indictment. (3 RR 10-12, 35) The appellant declined to sign the paperwork. (State's Ex. 1). The State then filed its own detainer request for extradition so that the appellant could be tried. (State's Exs. 9, 11).

After he arrived in Texas, the appellant filed a motion to dismiss based on an alleged violation of his Sixth Amendment right to a speedy trial; this seems to have been his first invocation of that right since the charges were filed. (CR 23-25). The trial court held a hearing on this motion, during which it heard testimony and admitted evidence regarding the nature of the delay in the case. The State argued that because the appellant knew about these charges for twenty years and had never requested a trial, his right to a speedy trial was not violated:

"That tells us what his true desire here is, is he wants the case dismissed. He does not desire a speedy disposition of his trial." (3 RR 40). The appellant argued that the State had "constitutional duties" to bring him to trial earlier, and thus the delay was all the State's fault. (3 RR 41). The appellant argued that he was harmed by the length of the delay, as well as by the fact that several pieces of physical evidence seem to have gone missing. (3 RR 42).

The trial court recessed without ruling, but seems to have denied the motion a few days later. (CR 100). After several resets at the defense's request, totaling nine additional months of delay, the appellant pled guilty in exchange for an agreed sentence of 30 years' confinement. (CR 47-57, 102-03).

## Argument

**The Fourteenth Court reached the correct conclusion by holding that the appellant's right to a speedy trial was not violated.**

This case involves the intersection of the Sixth Amendment right to a speedy trial and the Interstate Agreement on Detainers Act (IADA). The State will begin its argument by discussing those two areas of the

law. The State will then address the arguments regarding each *Barker* factor raised in the appellant's ground for review and brief.

## I. Legal Background

### A. The Sixth Amendment guarantees defendants a right to a speedy trial, but it does not reward those who, through inaction and acquiescence, demonstrate that they do not want a speedy trial.

The Sixth Amendment to the federal constitution provides that defendants "shall enjoy the right to a speedy … trial." U. S. CONST. amend. VI. This right, though, is a difficult one to assess because, among other reasons, it is often the case that a criminal defendant would prefer not to go to trial, or at least to have his trial delayed. *Barker v. Wingo*, 407 U.S. 514, 520-23 (1972). In an effort to vindicate defendants' rights without allowing them to easily game the system, the Supreme Court in *Barker* established a now-familiar four-part test for assessing whether the pre-trial delay in a particular case has violated the Sixth Amendment's guarantee. *See Id*. at 530-32. In short, the four factors are: 1) whether the delay was long enough to trigger an inquiry; 2) what caused the

delay; 3) whether the defendant timely asserted his right to a speedy trial; and 4) what harm was caused by the delay.[1] *Ibid*.

Analysis of the last three factors takes into consideration the vigorousness and timeliness of a defendant's demand for a speedy trial. *See United States v. Aguirre*, 994 F.2d 1454, 1456 (9th Cir. 1993). If a defendant is aware of the charges against him but does not make a request for a speedy trial until after the State has forced trial proceedings upon him, his untimely demand for a speedy trial will be weighed against him in the *Barker* analysis because it shows that he did not really want a speedy trial. *See Dragoo v. State*, 96 S.W.3d 308, 315 (Tex. Crim. App. 2003) (where, 41 months after being indicted, defendant filed speedy-trial claim day before trial was set to start, "this factor weighs very heavily against finding a violation of the speedy trial right."); *Harris v. State*, 827 S.W.2d 949, 957 (Tex. Crim. App. 1992) (speedy-trial motion filed on day of trial "indicates strongly that [defendant] did not really want a speedy trial").

[1] Though the application of these exact four factors has become rote habit in speedy-trial cases, *Barker* emphasized that "these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Barker*, 407 U.S. at 533. In its most recent application of *Barker*, the Supreme Court cited these factors before also factoring in the peculiar nature of the defendant's role in causing the delay in that case. *See Vermont v. Brillon*, 556 U.S. 81, 93 (2009).

Regarding the fourth factor, in some circumstances courts will make a presumption of harm based on nothing more than the length of the delay. *See State v. Wei*, 447 S.W.3d 549, 558 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (presuming harm from fact of 51-month delay where defendant did not know of charges). However, if a defendant acquiesced to the delay, such a presumption is inappropriate. *Aguirre*, 994 F.2d at 1457-58 (refusing to presume harm from 60-month delay where defendant knew of charges; "[defendant's] inaction contributed to the delay; accordingly he is entitled to no presumption of prejudice."); *see United States v. Villarreal*, 613 F.3d 1344, 1355 (11th Cir. 2010) (refusing to presume harm from 10-year delay where defendant knew of charges and contributed to delay: "Far from suffering prejudice, these facts suggest the defendant actually benefitted from the delay because a defendant suffering prejudice is unlikely to exacerbate his delay through evasive tactics or fail to assert his right to a speedy trial."). A defendant who acquiesced to the delay will need to show actual harm for this part of the *Barker* analysis. *Aguirre*, 994 F.2d at 1458.

### B. The Interstate Agreement on Detainers Act provides incarcerated defendants with an absolute right to force a trial on any pending out-of-state indictments.

Both Texas and Nebraska have passed into law the Interstate Agreement on Detainers Act (IADA). *See* TEX. CODE CRIM. PROC. art. 51.14; NEB. REV. STAT. ANN. § 29-759 (Westlaw through 2017). Under this agreement, when charges are brought in one state against a defendant who is serving a term of imprisonment in another state, the charging state may file a detainer on the inmate. That detainer provides the inmate with notice of the charges against him, and with notice that he has the right to demand to be sent to the charging state to stand trial. TEX. CODE CRIM. PROC. art. 51.14 art. III. If the inmate makes such a demand, the warden of his prison must send the request to the charging state, and the charging state must bring the inmate to trial within 180 days of receiving the demand, or else the charges must be dismissed. *Ibid*; *see Gibson v. Klevenhagen*, 777 F.2d 1056, 1058 (5th Cir. 1985).

The IADA allows the state that filed the detainer to demand the inmate's extradition to stand trial. TEX. CODE CRIM. PROC. art. 51.14 art. IV. When such a demand is filed, once the inmate clears extradition and arrives in the charging state he must be brought to trial within 120 days. *Ibid*.

Whether it is the inmate or the charging state who exercises their trial option, once the prosecution in the charging state has concluded the inmate must be returned to the sending state "[a]t the earliest practicable time" to resume serving his original sentence. *Id*. at art. V(e).

## II. Addressing the *Barker* Factors

The State will structure its reply by describing the Fourteenth Court's holding for each *Barker* factor and then replying to the appellant's argument for that factor.

### A. Factor One: Length of the Delay

#### 1. The Fourteenth Court held the first factor "weighed heavily" against the State.

The Fourteenth Court correctly held that the first *Barker* factor — the length of the delay — was long enough to trigger a speedy-trial inquiry. *Hopper*, 495 S.W.3d at 474. The length of the delay in this case was 21 years, thus neither party challenges that holding. The Fourteenth Court further held that the length of the delay, on its own, "weighs heavily against the State." *Ibid*. (citing *Gonzales v. State*, 435. S.W.3d 801, 809 (Tex. Crim. App. 2014)). In the section of its opinion describing the balancing test it conducted, the Fourteenth Court stated that this factor "favor[s] appellant," but made no further comment. *Id*. at 481.

**2. The appellant believes the length of the delay, on its own, required a dismissal. That position has no basis in the law.**

The appellant spends a few pages of his brief criticizing the Fourteenth Court's statement that the delay here "weighs heavily" against the State, because the delay in this case is substantially longer than other periods of delay that courts have said "weigh heavily" against the State. (*See* Appellant's Brief at 20-22 (*citing, inter alia, Rodriguez v. State*, 227 S.W.3d 842, 844 (Tex. App.—Amarillo 2007, no pet) (stating that 32-month delay "weighs heavily" against State); *State v. Wei*, 447 S.W.3d 649, 554 (Tex. App.—Houston [14th Dist. 2014, pet. ref'd) (51-month delay "weighed heavily" against State)). The only argument the State can infer from this part of the appellant's brief is that the Fourteenth Court should have used rhetorical flourishes or a superlative to describe how heavily the delay weighed against the State. (*See* Appellant's Brief at 22-23 (citing favorable to, *inter alia*, *Orand v. State*, 254 S.W.3d 560, 566 (Tex. App.—Fort Worth 2008, pet. ref'd) (weighing 11-year, 8-month delay "extremely heavily" against State)). The State does not believe the descriptive language in an opinion is precisely correlated to the weight a court gives a factor in its decision.

The appellant concludes this part of his brief by claiming that the first factor should "weigh[] so heavily in favor of the defense as to override the other factors." (Appellant's Brief at 24). But that is not how speedy-trial law works. *Barker v. Wingo*, 407 U.S. 514, 523-24 (1972) (rejecting position "that the Constitution requires a criminal defendant to be offered a trial within a specified time period" and adopting balancing-test approach to speedy-trial cases). If the length of the delay, by itself, could require dismissal, then a defendant could prevail simply by being a fugitive for long enough, or by causing his own delay, and that is plainly not the law. *See, e.g., Wilson v. Mitchell*, 250 F.3d 388, 394-96 (6th Cir. 2001) (right to speedy trial not violated by 22-year delay caused by defendant evading police).

### 3. Technically, the first factor should not carry any weight whatsoever in cases, like this one, where the court finds that the defendant acquiesced to the delay.

In conducting a *Barker* analysis, there is a significant amount of confusion regarding whether the first factor is merely a threshold inquiry, or whether it is a factor that carries weight. In *Barker*, the Supreme Court stated that the first factor was "to some extent a triggering mechanism." *Barker*, 407 U.S. at 530. That court later

characterized the first factor as "a threshold in the [speedy-trial] inquiry," the purpose of which is to determine whether inquiry should continue. *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986). If the first factor is thought of in these terms, then it is obvious it does not carry weight in the final analysis; instead it determines whether there should *be* a final analysis. Giving weight to the length of the delay without considering the cause of the delay is the antithesis of a *Barker* analysis.

The correct way, under current Supreme Court precedent, to consider the length of the delay is illustrated by *Doggett v. United States*, 505 U.S. 647 (1992). The delay in that case was 8 ½ years, 6 of which were attributable to the prosecution's negligence. *Doggett*, 505 U.S. at 652-53. For the first factor, the Supreme Court considered all 8 ½ years for determining whether the case crossed the threshold required for further analysis. *Id*. at 651-52.

The Court referred to the first factor as a "double enquiry," however, and, after finding that the delay was long enough to trigger analysis, noted that the "extraordinary" length of the delay would have "further significance" in the speedy-trial analysis. *Id*. at 652. When the Court got to the fourth factor — harm caused by the delay — it held that

if the delay attributable to the prosecution's negligence was long enough, and if the defendant had not acquiesced to the delay, then the delay itself could create a presumption of harm that relieved the defendant of the burden of showing actual harm. *Id*. at 657-58.

While at first glance it may appear that the *Doggett* presumption of harm is the same as assigning weight to the first factor, that is not the case. The *Doggett* presumption was actually the result of looking at the first three factors combined: The *Doggett* presumption counted only that period of time that was attributable to the prosecution's negligence, thus it took into account the analysis conducted in the second factor (the cause of the delay); and *Doggett* held that the presumption would not apply if the defendant acquiesced to the delay, thus taking into account the analysis conducted in the third factor (the defendant's invocation of his rights).

Unfortunately, this Court (like numerous other courts) has occasionally referred to the first factor as carrying independent weight. *See Gonzales*, 435 S.W.3d at 809 ("[the first factor] — in and of itself — weighs heavily against the State.") (quoting *Zamorano v. State*, 84 S.W.3d 643, 649 (Tex. Crim. App. 2002)). While that was technically an inaccurate statement in those cases, it was *practically* correct; in both

*Gonzales* and *Zamorano*, the entire delay was attributable to the prosecution's negligence and the defendant did not acquiesce to the delay, thus whatever harm this Court presumed as part of the *Doggett* presumption was taken directly from the length of the delay.

In this case, however, the Fourteenth Court's statement that the first factor "weighs heavily against the State" is both technically and practically incorrect. Though the Fourteenth Court cited to *Gonzales* when stating that the first factor weighed against the state, the *Gonzales* court weighed the first factor against the State only because of the *Doggett* presumption. However, in analyzing the fourth *Barker* factor in this case, the Fourteenth Court held that the appellant was not entitled to the *Doggett* presumption of harm because he acquiesced to the delay. *Hopper*, 495 S.W.3d at 478. Without a *Doggett* presumption of harm, it makes no sense to state that the first factor "weighs heavily against the State."

The State asks this Court, as part of its *Barker* analysis to return to *Doggett's* understanding of the first factor: It is a threshold inquiry that, depending on the second and third factors, can inform the fourth factor. It is not itself a factor with weight.

### B. Factor Two: Reason for the Delay

#### 1. The Fourteenth Court held that 18 ½ years of the delay was caused by the State's negligence and held this factor against the State, "although not heavily."

The Fourteenth Court divided the delay in this case into two parts, the first running from the time of the Texas indictment to the end of the appellant's trial in Nebraska, a period of a year and a half, and the second running from the time of the Nebraska trial until the appellant filed his motion to dismiss in Texas, a period of eighteen-and-a-half years. *Hopper*, 495 S.W.3d at 474. The Fourteenth Court held that the first part of the delay was justified and therefore did not count against the State; it does not seem that either party questions this holding on discretionary review.

As for the remaining 18 ½ years, the Fourteenth Court noted that the State had given no reason for this delay in the trial court. *Id*. at 475. The appellant had argued that because the State knew of his whereabouts but did not bring him to trial, it acted intentionally and in bad faith in causing the delay. The Fourteenth Court noted that, while the record showed that the State knew where the appellant was, the record was silent as to why the State did not request a trial. In the absence of evidence that the State "engaged in delay for an

impermissible reason, such as to obtain an unfair tactical advantage," the Fourteenth Court could not infer a finding of bad faith. *Ibid*.

The State argued to the Fourteenth Court that the delay should not count against the State because the detainer put the appellant on notice of the pending charge and gave him the ability to demand a trial.[2] The Fourteenth Court rejected this argument and held that the 18 ½ years of delay were caused by the State's negligence and thus weighed against the State, "although not heavily." *Id*. at 475-76.

### 2. The appellant claims that State intentionally caused the delay. This claim has a tenuous relationship with the record.

At the hearing in the trial court, the State presented two witnesses to testify about the Harris County District Attorney's Office's handling of IADA. The first was Kim Bryant, who had been an extradition administrator with the office for fifteen years. (3 RR 10). She said that when she learns there is a defendant in prison in another state, her normal practice is to inquire whether the defendant wishes to begin IADA procedures. (3 RR 9). Bryant said that if she gets no answer, she

[2] This Court granted review of this argument on petition from the State. The State believes the arguments on this point are well developed in the briefs on the State's petition for discretionary review. This brief is devoted to addressing the arguments presented by the appellant in his petition and brief on the merits.

speaks with the prosecutor on the case and asks if he or she wishes to begin IAD procedures. (3 RR 9). Bryant said that she had followed that procedure in this case, and the Nebraska prison "called [her] back and told [her], no he didn't want to pursue it." (3 RR 10). Bryant did not testify regarding when this conversation took place, but the record shows that the appellant was presented with an IADA form on September 13, 2013, and he refused to sign. (State's Ex. 1).[3]

Bryant said that after this refusal, she contacted the prosecutor on the case and asked if that person wished to initiate IAD procedures. (3 RR 10). Bryant agreed that one of the considerations in making this decision is "whether we can find witnesses … whether the case has prosecutorial merit." (3 RR 10). Evidently the prosecutor wanted to bring the appellant back, because Bryant sent off IAD paperwork on September 4, 2013, and the appellant arrived in Harris County on October 19. (3 RR 11-12).

The State also presented testimony from Barry Saucier, who was an investigator for the Harris County District Attorney's Office. (3 RR 33). Saucier said that, after some searching, he made contact with the

[3] The record also shows that the appellant was offered IAD paperwork in 1995, but this would have predated Bryant's tenure with the Harris County District Attorney's Office. (State's Ex. 1)

complainant in this case on January 3, 2013. (3 RR 34-35). Saucier said that when asked whether she was willing to participate in the prosecution of this case, the complainant "was very willing. In fact, she was almost excited." (3 RR 35).

In his brief, though he is adamant that the State's delay in this case was intentional, the appellant is somewhat hazy on what evidence actually points to that conclusion. The appellant points to Bryant's (accurate) statements that IADA procedures are "not mandatory" and to the trial prosecutor's (accurate) statement that the appellant "doesn't have a right for the State to initiate IADA to bring him back to answer charges." (Appellant's Brief at 25). From this, along with Bryant's comment about "prosecutorial merit," it seems the appellant wants this Court to infer that for 18 ½ years the Harris County District Attorney's Office kept tabs on him and, only when the State's case was at its strongest and certain evidence had gone missing, pulled the trigger on bringing him back for trial.

While the lack of dates in Bryant's testimony does leave open the possibility that she was describing a decades-long intentional delay, that is such an implausible conclusion that, the State submits, it would be imprudent to reach that conclusion from such marginal inferences. The

appellant had an opportunity to cross-examine Bryant. If he really believed that for 18 ½ years — a period during which Harris County had five different elected or appointed district attorneys — the Harris County District Attorney's Office had a consistent, malevolent intent to delay his case to gain an unfair advantage, he should have done a better job of adducing facts to support that theory.

A much more plausible conclusion is that there is a lengthy period of time for which the record contains no explanation as to why the State did not bring the appellant to trial, and Bryant's testimony concerns the State's decision to end the delay.[4] The trial court made no explicit fact findings, thus this Court will defer to the trial court's implicit fact resolution of any disputed fact issues in the State's favor. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). The Fourteenth Court deferred to the trial court's implicit finding that the bulk of the delay in this case was not intentional, and considering the lack of direct evidence that the State intentionally delayed the case, this Court should do so as well.

[4] Bryant's testimony was about bringing the appellant to trial. It showed an intent, at the end of a lengthy delay, to bring the appellant to trial. This is completely different from showing an intent to *cause* a lengthy delay and then bring the appellant to trial.

### 3. The appellant does not point to evidence of any attempt by the State to gain an unfair advantage.

When *Barker* discussed the relative weight to be assigned to delay caused by the prosecution, it's focus was on the prosecution's motives: If the motives were good (like finding a missing witness), the delay will not weigh against the prosecution; if there was no motive behind the delay (like a court backlog or the failure to search for the defendant), the delay will be described as resulting from "negligence" and will weigh somewhat against the prosecution; and if the State's intentions were bad (such as delaying trial until a defense witness became unavailable), the delay will weigh heavily against the prosecution. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

As the Fourteenth Court pointed out, though the appellant claims that the State intentionally caused the delay, he cannot point to any evidence that it did so with a malevolent motive. The appellant points to testimony about locating the complainant and claims that the State delayed the case in "bad faith … based on tactical considerations." (Appellant's Brief at 27).

The appellant misapprehends what is meant by "bad faith." *Barker* explicitly mentioned locating a missing witness as "a valid reason" for

the prosecution to delay a trial. *Barker*, 407 U.S. at 531. A prosecutor's decision to not go to trial unless she can prove her case is not a mere "tactical consideration," it's a moral, ethical, and legal obligation.

The State is *not* arguing that it intentionally delayed this case for 18 ½ years while diligently searching for a missing witness. While that interpretation is not inconsistent with the record, it is, like the appellant's proposed interpretation, sufficiently implausible that it should not be inferred. The State brings this up merely to point out that, to whatever degree the record could support a finding of intentional delay, the intent behind that delay was not to gain an unfair advantage.

### C. Factor Three: Invocation of the Right

#### 1. The Fourteenth Court held that the record supported an inference that the appellant was aware of his ability to force a trial, thus his delay of 18 ½ years in invoking his right to a speedy trial weighed heavily against finding a violation of that right.

The Fourteenth Court noted that "the appellant sat on his rights for more than eighteen and a half year, nearly the same amount of time as the State delaying in brining appellant to trial." *Hopper*, 495 S.W.3d at 476. The Fourteenth Court analyzed the IAD form that the appellant signed in 1995 and, based on its language, concluded that his signature

on the document provided sufficient proof to support an implied finding by the trial court that the appellant knew of the charges against him and his ability to force a trial. *Id*. at 477. The Fourteenth Court concluded that the appellant's delay in asserting his right to a speedy trial was "strong evidence that appellant did not actually want a trial." *Id*. at 477-78.

### 2. The appellant's lengthy answer does not bring into quesiton the Fourteenth Court's holding.

The Fourteenth Court's holding on this factor was very simple: The appellant was aware of the pending charge; while he had no obligation to bring himself to trial, his failure to assert his right to a speedy trial indicates that he did not want a speedy trial. This conclusion is consistent with cases from this Court and the federal circuits. *See Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) (41-month delay in asserting right "weighs very heavily against finding a violation of the speedy trial right"); *Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003) (35-month delay in asserting right weighed "very heavily" against finding violation)*; United States v. Villarreal*, 613 F.3d 1344, 1355 (11th Cir. 2010) (delay of ten years between defendant learning of charges and filing speedy-trial claim "weigh[ed] heavily

against [him]."); *United States v. Aguirre*, 994 F.2d 1454, 1457 (9th Cir. 1993) (delay of five years between defendant learning of charges and filing speedy-trial claim weighed against defendant: "The Speedy Trial Clause primarily protects those who assert their rights, not those who acquiesce in the delay — perhaps hoping the government will change its mind or lose critical evidence.").

The appellant's scattershot response to this simple observation misses the mark. First he claims that the trial court erred in deferring to an implied finding that the appellant was aware of his rights. The appellant claims that because that finding was based on a document, rather than witness credibility, an appellate court should review it *de novo*. (Appellant's Brief at 28-29). But what is to review? State's Exhibit 1 contains a notice to the appellant of the pending charge, a statement that he has the right to request final disposition of that charge, and the appellant's signature. The appellant presented no evidence that he did not understand the document he signed or that it was not his signature. Neither the trial court nor the appellate court resolved any disputed facts here.

The appellant then claims that this document was "insufficient evidence of acquiescence." (Appellant's Brief at 29). The appellant cites

to *Gonzales v. State*, 435 S.W.3d 801 (Tex. Crim. App. 2014) for the proposition that "it is the State's burden to 'prov[e] that Appellant acquiesced to the delay." (Appellant's Brief at 30). But that language from *Gonzales* was a discussion of the fourth *Barker* factor (harm), and was referring to situations where "a defendant has timely asserted his right to a speedy trial." *Gonzales*, 435 S.W.3d at 815. Thus using it in the analysis of the third *Barker* factor — where the question is *whether* the defendant timely asserted his right to a speedy trial — is inappropriate.

The appellant then raises four evidentiary matters he could have, but failed to, litigate in the trial court. (Appellant's Brief at 30-32). Was the 1995 notice actually served? Who served it? Did the appellant have "access [to] any resources that could facilitate his understanding of the form or his request for a trial"? Would the Nebraska authorities have given him a request form had he sought one? If the appellant had presented evidence on any of these subjects to the trial court, perhaps it would be enough to warrant a holding that the trial court or the Fourteenth Court was wrong to believe the appellant knew of the charges against him and his ability to force a trial. But he did not, and all this Court is left with is a document showing that the appellant was aware both of the charges against him and his ability to force a trial.

The appellant moves on to note the "Flesch-Kincaid Grade Level score" of the IADA form and call the form unreadable. (Appellant's Brief at 32-33). The form is written in English and is plain enough, and the appellant presented no evidence he could not understand it.[5] As the Fourteenth Court noted, holding that, as a matter of law, a standard IADA form is insufficient to advise inmates of pending charges "could have ramifications in every jurisdiction that has adopted the IAD[A]." *Hopper*, 495 S.W.3d at 477.

The appellant then points out that the IADA form "is not intended to be used as a warning regarding constitutional rights" (Appellant's Brief at 33-34), which may be true. But the appellant does not cite any authority for the proposition that a defendant must be advised in formal terms of his right to speedy trial. The question is whether he knew of the charges against him, and whether he did anything to indicate a desire for a speedy trial. *See, e.g., United States v. Villarreal*, 613 F.3d 1344, 1354 (11th Cir. 2010) (where defendant learned about charges and went into hiding, failure to invoke right to speedy trial held against defendant on

[5] The appellant failed to adduce any evidence of his ability to read, or his educational attainment. Based on the record, he might well be illiterate, or he might well be a lawyer himself. If the question is, "Did the person who signed this form understand it?", information about the person who signed the form would be critical to undermining the general presumption that people are responsible for understanding things they sign.

third *Barker* factor without inquiry into whether defendant had been admonished regarding rights).

In his final argument on the third point, the appellant discusses *Barker* and its rejection of the demand-waiver rule. (Appellant's Brief at 34-37). But the third *Barker* factor is not an application of the demand-waiver rule. It is an assessment of whether the defendant invoked his right to a speedy trial in a timely manner. The failure to do so, *Barker* held, is not *always* fatal to a speedy-trial claim (and the Fourteenth Court made no holding that it was), but "will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532. This is consistent with the Fourteenth Court's handling of the third *Barker* factor. The appellant's only arguments to the contrary are factual allegations he failed to prove in the trial court.

### D. Factor Four: Harm

#### 1. The Fourteenth Court held that the appellant was not entitled to a presumption of harm because he acquiesced to the delay. It also held that the appellant had failed to show any actual harm.

The Fourteenth Court began its discussion of the fourth *Barker* factor by addressing the *Doggett* presumption of harm. That presumption arises when the delay attributable to the State's negligence

becomes extraordinarily excessive. While the delay in this case was long enough to warrant such a presumption, the Fourteenth Court held, consistent with *Doggett*, that the appellant's acquiescence to that delay — "he sat on his rights for more than eighteen and a half years" — rebutted any presumption of harm. *Hopper*, 495 S.W.3d at 478.

The Fourteenth Court then addressed the appellant's claims of particularized harm. The only harm the appellant alleged was that his defense had been hindered by the loss of evidence.[6] However, because nothing indicated whether the missing evidence was incriminating or inculpatory, the Fourteenth Court held that this was insufficient to support a finding that the appellant had been harmed. *Id*. at 479 (citing *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)).

The Fourteenth Court went on to explain that the case was "complicat[ed] … further" by the appellant's failure to explain what his defense would have been had the case gone to trial in a timely manner. Given the facts of the sexual assault, it was possible the appellant could have raised an identity defense, or he could have admitted the sexual act

[6] The parties had stipulated that certain evidence had gone missing since 1993, including "the contents of the rape kit, the complainant's clothing … a shirt that belonged to the defendant, and also possibly the original photospread…." (2 RR 32). The prosecutor said that the only remaining evidence was "the evidence that was originally submitted to the Medical Examiner's Office for testing." (2 RR 32). There was no mention of what that evidence was.

and argued that it was consensual. Had he argued identity, the missing physical evidence would have been of import. But had he argued consent, "in all likelihood, the [missing] physical evidence would have had little to no bearing on the jury's assessment of guilt." *Id*. at 480. The Fourteenth Court concluded this discussion by noting that "[b]ecause appellant never identified a theory, the trial court was free to find that appellant did not prove that his defense was impaired." *Id*. at 480-81. The Fourteenth Court deferred to this implied finding and concluded that the fourth *Barker* factor did not weigh in favor of the appellant.

### 2. The appellant's argument to this Court does not meaningfully challenge the Fourteenth Court's holding regarding harm.

The appellant begins his argument on this point by extolling the virtues of DNA evidence and claiming that "the prejudice is obvious when DNA evidence disappears in a sexual assault case." (Appellant's Brief at 37-38). But that is not obvious at all — a defendant would not be harmed by the loss of DNA evidence that connected him to the deed.

Nowhere in his brief does the appellant explain why anyone should assume that all the missing evidence was exculpatory. Proving actual harm for purposes of speedy-trial claims requires more than

speculation about the significance of missing evidence. *See Loud Hawk*, 474 U.S. at 315 (mere possibility of harm from missing evidence does not weigh in defendant's favor); *State v. Munoz*, 991 S.W.2d 818, 829 (Tex. Crim. App. 1999) (pointing out that *Barker* requires missing evidence to be relevant to the outcome of the case to factor into speedy-trial analysis, and concluding that court of appeals erred in finding that assertion of unspecified missing memories was sufficient to show harm for fourth *Barker* factor).

The appellant failed to show any actual harm, and his acquiescence to the delay means that this Court should not presume harm. *See United States v. Aguirre*, 994 F.2d 1454, 1457 (9th Cir. 1993) (defendant's "acquiescence in the delay, despite his knowledge of the outstanding indictment, is a second reason to place the burden of proving prejudice on him—and place it more heavily."). The Fourteenth Court's holding regarding the fourth *Barker* factor was correct.

## Conclusion

The State asks this Court affirm the Fourteenth Court, while correcting its holdings regarding the first and second *Barker* factors.

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## Certificate of Compliance and Service

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